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In the Supreme Court of the United States

OCTOBER TERM, 1985

GRAHAM LEE KENDALL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

MAURY S. EPNER
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

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QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support petitioner's conviction on one count of conspiracy to possess marijuana with intent to distribute.

2. Whether the evidence was sufficient to support petitioner's Travel Act conviction.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 766 F.2d 1426.

JURISDICTION

The judgment of the court of appeals was entered on July 3, 1985, and a petition for rehearing was denied on August 19, 1985. The petition for a writ of certiorari was filed on September 25, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Oklahoma, petitioner was convicted on one count of conspiracy to possess marijuana with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and

846, and one count of violating the Travel Act, 18 U.S.C. 1952.[1] The court of appeals affirmed (Pet. App. 1a-26a).

The evidence at trial is described in the court of appeals' opinion. In August 1981, Larry Carr approached Patrick Callihan with the suggestion that they buy an airplane and enter the drug smuggling business. Carr and Callihan previously had been associated in an unsuccessful business venture, and both were in desperate need of money. Callihan initially balked at the idea, but, in the early summer of 1982, the two agreed to try to find an airplane and sources of employment in the drug trade. Callihan, an experienced pilot, knew petitioner from earlier legitimate aircraft dealings. Petitioner was an experienced and very successful airplane dealer, with contacts around the country and an industry-wide reputation for his knowledge and expertise. Pet. App. 2a.

In June 1982, Carr and Callihan traveled to Oklahoma City to talk with petitioner at his place of business, Oklahoma Aircraft, located at Page Airport near Oklahoma City. During this meeting, Callihan and Carr asked petitioner about the capabilities of various aircraft, including their long range fuel and useful load capacities. Callihan told petitioner that he and Carr were planning to smuggle cocaine and marijuana and that they were looking for a long-range airplane with plenty of room for hauling marijuana. Petitioner described several available aircraft, but, because neither Carr nor Callihan was qualified to fly those particular planes and because petitioner insisted on cash-only terms for the purchase of a plane, Callihan and Carr decided to look elsewhere. Pet. App. 2a-3a.

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[1]Petitioner was acquitted on one count of conspiracy to import marijuana with intent to distribute, in violation of 21 U.S.C. 846 and 963.

Sometime later, Callihan and Carr, through fraudulent means, purchased a Piper Navajo Chieftain aircraft in Las Vegas and flew that plane back to Oklahoma Aircraft. Upon their arrival, Callihan noticed a "bladder" (a fuel tank that can be installed within a plane to increase its range) positioned on a forklift inside petitioner's hangar. Callihan first spoke with an individual named Les, and then with petitioner, about purchasing the bladder and having it installed in his plane. Petitioner told Callihan to see Les, and Callihan paid Les to install the bladder. During this same visit, petitioner showed Callihan an aircraft owned by William Geittmann, an acquaintance of petitioner's. Petitioner pointed out the plane's long range fuel capabilities and recommended the same fuel system to Callihan, noting that it was particularly well suited for smuggling trips to South America. Pet. App. 3a.

In July 1982, Callihan and Carr took part in an unsuccessful attempt to smuggle marijuana into the United States from Mazatlan, Mexico. Failing in this venture, they flew back to Oklahoma Aircraft and had Les remove the bladder from the plane. While Callihan's plane was sitting in the hangar at Oklahoma Aircraft, Geittmann, a long-time and very successful drug smuggler, asked petitioner about Callihan's plane and whether the owner might be interested in flying for him. Petitioner told Geittmann that he knew Callihan wanted to work and was available. Pet. App. 3a-4a.

During his stay at Oklahoma Aircraft, Callihan spoke with petitioner and asked about the possibility of working on a smuggling venture with Geittmann. Having known Geittmann since 1974, petitioner spoke highly of him and told Callihan that the two of them would work well together. Petitioner then drove Callihan to a nearby pay phone to call Geittmann. En route to the pay phone, Callihan offered petitioner 20% of any deal he made with Geittmann. Using his telephone credit card, petitioner then

placed a long distance call to Geittmann. After telling Geittmann that he had someone he wanted him to talk to, petitioner hung up to await a return call. When Geittmann called several minutes later, petitioner answered and spoke to him, recommended Callihan as reliable and trustworthy, and then handed the telephone to Callihan. Pet. App. 4a.

Geittmann and Callihan arranged to talk further, and on August 3, 1982, Geittmann called Callihan to set up a meeting at Geittmann's home in Aspen, Colorado. Callihan called petitioner to tell him of this scheduled meeting, and petitioner expressed his approval. On August 4, Callihan traveled by commercial aircraft from Oklahoma City to Aspen, where he was met by Geittmann. Callihan and Geittmann discussed flying marijuana and cocaine into the United States. They agreed that Callihan would provide the aircraft and related servicing, while Geittmann would provide the financing, ground crew, facilities, and security in Mexico and South America. No specific trip was arranged, but Geittmann told Callihan he would contact him very soon. During this meeting, Geittmann received a telephone call from petitioner. Petitioner told Geittmann that he had discovered a few things about Callihan he did not like and that Callihan was not trustworthy. Geittmann in turn informed Callihan that he should "mend his fences" with petitioner. Callihan and petitioner subsequently met in Oklahoma City to resolve their differences, and each separately telephoned Geittmann to inform him of the settlement. Pet. App. 4a-5a.

Several days after his return to Oklahoma City, Geittmann contacted Callihan and told him that a smuggling trip had been arranged. On about August 10, 1982, Geittmann sent two men to Oklahoma City to serve as a ground crew for the venture. The two men met with Callihan and Carr, and they all visited a proposed landing site in southwestern Oklahoma. Callihan then had the bladder reinstalled in his

plane, informed petitioner of the installation, and, with petitioner's permission, stored the refitted plane at Oklahoma Aircraft. Pet. App. 5a.

On August 18, 1982, Callihan and Carr flew their plane to Cancun, Mexico. There, they met Geittmann, who had arranged for their arrival in Cancun, had bribed several local officials, and had scheduled their departure to South America. On August 20, Callihan and Carr flew to Barranquilla, Colombia, loaded their plane with approximately 1,500 pounds of marijuana, and returned to Cancun. They departed Cancun for the United States on August 21. Their destination was Oklahoma, but they diverted to Louisiana because of severe weather. Upon landing in Louisiana, they were immediately arrested by government agents. Pet. App. 5a.

ARGUMENT

1. Petitioner renews his contention (Pet. 13-18) that the evidence was insufficient to support his conspiracy conviction and alleges that the decision below conflicts with *United States* v. *Melchor-Lopez*, 627 F.2d 886 (9th Cir. 1980). Petitioner's fact-bound argument is without merit.

The court below recognized (Pet. App. 6a), in reliance on *American Tobacco Co.* v. *United States*, 328 U.S. 781, 810 (1946), the settled principle that a conspiracy requires proof that two or more persons agreed to commit some unlawful act. The court also held (Pet. App. 9a) that neither petitioner's knowledge of the existence of such an agreement nor his mere association with conspirators would be sufficient, standing alone, to support his conspiracy conviction. "The evidence must also show that [petitioner] knowingly joined the conspiracy, or knowingly and intentionally committed an act in furtherance of it" (*ibid.*). Viewed in the light most favorable to the government, *Glasser* v. *United States*, 315 U.S. 60, 80 (1942), the evidence established that petitioner joined as well as furthered the marijuana conspiracy.

First, the evidence established that petitioner was aware that Callihan was a willing but financially unsuccessful smuggler of large quantities of marijuana in need of work and that Geittmann desired just such an individual to serve in his smuggling network (8 R. 108, 169-171, 190, 257, 260; 10 R. 586-587, 639). The evidence also established that petitioner was instrumental in bringing the two together (8 R. 201-203), that he was offered (8 R. 203) and expected (10 R. 593, 670-671) payment, and that he held up agreement between Callihan and Geittmann until his differences with Callihan were settled to his satisfaction (8 R. 208-209; 10 R. 657-658, 662). Finally, the evidence demonstrated that petitioner and Callihan agreed that Callihan's aircraft would be fitted with a supplemental fuel tank and would remain hidden at petitioner's place of business pending Callihan's rendezvous with Geittmann (8 R. 214-216). The evidence, in short, established the existence of an agreement among the three parties to obtain a large quantity of marijuana for which each would be compensated in relation to the value of his services, as well as acts performed by petitioner—telephone calls, assistance with the fuel tank installation, hiding Callihan's aircraft—in furtherance of the agreement (see Pet. App. 9a-10a).

Petitioner nevertheless insists, in reliance on *United States* v. *Melchor-Lopez, supra*, that the "Ninth Circuit * * * would have found the evidence insufficient to convict [him] of conspiracy to possess marijuana with intent to distribute" (Pet. 17). In *Melchor-Lopez*, the court held that the evidence was insufficient to show that the defendant ever entered into any agreement to sell heroin and cocaine, because he "firmly insisted on certain conditions unacceptable to his would-be co-conspirators" (627 F.2d at 891). The court of appeals concluded that the evidence also failed to show that a co-defendant entered into any agreement, because he did no more than make telephone calls resulting

in an agreement to *negotiate* a drug transaction, but the negotiations ultimately proved fruitless (627 F.2d at 892). Here, by contrast, petitioner plainly did more than simply arrange negotiations; he brought the parties together, was aware that he would be compensated once the arrangement succeeded, held up a final agreement until his misgivings had been eliminated, and agreed to customize and then hide Callihan's aircraft after agreement had been reached. Unlike the defendants in *Melchor-Lopez*, petitioner both entered into an agreement and performed acts in furtherance thereof.

2. Petitioner also asserts that the court of appeals impermissibly broadened the application of the Travel Act, 18 U.S.C. 1952. He argues (Pet. 20-22) that the court below upheld his Travel Act conviction because he reasonably could have foreseen that Callihan would travel interstate and that petitioner therefore "caused" such travel when he introduced Callihan and Geittmann by telephone. Such a holding, petitioner asserts, conflicts with this Court's decision in *Rewis* v. *United States*, 401 U.S. 808 (1971). Petitioner also contends (Pet. 22-24) that the court of appeals erroneously upheld his Travel Act conviction despite the absence of any proof of the existence of a "business enterprise." Neither contention has merit.[2]

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[2]Petitioner also argues (Pet. 18-19) that there is a conflict among the circuits on the need for proof that one must knowingly cause interstate travel. In this case, the court of appeals concluded (Pet. App. 12a) that such knowledge was not necessary. Petitioner notes that the Sixth Circuit, in *United States* v. *Alsobrook*, 620 F.2d 139 (6th Cir.), cert. denied, 449 U.S. 843 (1980), held to the contrary. While petitioner has accurately described *Alsobrook*, he neglects to point out that the Sixth Circuit has come to recognize that it is alone among the courts of appeals in requiring actual knowledge and that "the basis of the knowledge requirement under the Travel Act may no longer be valid." *United States* v. *Gallo*, 763 F.2d 1504, 1521 n.25 (6th Cir. 1985).

a. The court of appeals concluded that petitioner "caused" Callihan's interstate travel to meet Geittmann within the meaning of 18 U.S.C. 1952 and 18 U.S.C. 2. Petitioner knew that Callihan sought employment as a drug smuggler and that Geittmann desired just such a courier. Accordingly, he placed an interstate telephone call to Geittmann, and when Geittmann and Callihan subsequently spoke, they agreed to meet in Colorado to arrange the transport of a large quantity of marijuana, a meeting about which petitioner was informed in advance and expressed approval (8 R. 206). Under these circumstances, the court of appeals correctly concluded that petitioner "caused" Callihan's travel by acting as the catalyst (Pet. App. 11a-12a).

Petitioner nevertheless contends that the court of appeals based its conclusion that he "caused" Callihan's travel on the finding that he reasonably could have foreseen such travel, in contravention of *Rewis* v. *United States, supra.* In *Rewis*, the Court concluded that the interstate nexus necessary under the Travel Act could not be established merely by demonstrating that interstate travel was reasonably foreseeable (401 U.S. at 813). Here, by contrast, the court of appeals' only discussion of foreseeability came in response to petitioner's very different contention (see note 2, *supra*) that his conviction under the Travel Act required that he *knew* Callihan would travel interstate. In rejecting petitioner's argument, the court of appeals concluded that petitioner, "knowing that Geittmann did not live in Oklahoma * * *, could reasonably have known * * * that Callihan and Geittmann would have to meet to arrange the details of the smuggling trip and that interstate travel for this purpose was very likely. There is no requirement in the Travel Act that a defendant * * * have knowledge of the intended interstate means" (Pet. App. 12a).

The court of appeals' conclusion (Pet. App. 11a-12a & n.3) that petitioner "caused" the interstate travel, however, did not rely upon any such notions of foreseeability. Instead, the court held (Pet. App. 11a-12a (footnote omitted)) that petitioner, "knowing both Callihan's desire to be hired as a pilot for marijuana smuggling and Geittmann's need for a pilot and plane, introduced the two men for the purpose of assisting them in an illegal narcotics venture. This introduction, in the context of this case, constitutes a sufficient causal connection necessary for a violation of 18 U.S.C. § 2." There is accordingly no conflict between *Rewis* and the instant case. See *Rewis*, 401 U.S. at 813-814; see also *United States* v. *Roselli*, 432 F.2d 879, 891 (9th Cir. 1970), cert. denied, 401 U.S. 924 (1971) (knowing interstate travel or knowing use of an interstate facility not an element of a Travel Act violation).

b. Nor did the court of appeals err in finding the existence of a "business enterprise" within the meaning of 18 U.S.C. 1952(b)(1). The court of appeals correctly noted that such an enterprise requires proof of "a continuing course of conduct rather than sporadic casual involvement in a proscribed activity" (Pet. App. 13a (citing *Rewis*, 401 U.S. at 811 n.6)). The evidence here established such a continuing course of conduct.

As early as April 1982, Callihan decided to enter the marijuana smuggling business and sought out petitioner for advice regarding appropriate aircraft and equipment on at least two occasions. Petitioner recommended an aircraft capable of carrying five tons of marijuana and showed Callihan an airplane equipped with supplemental fuel tanks, recommending such a modification for marijuana smuggling trips to South America. Later, after Callihan flew the modified aircraft on an unsuccessful smuggling trip to Mexico, he stored it at petitioner's place of business, where Geittmann had occasion to see it. It was only then

that petitioner—aware that Callihan desired employment as a marijuana-smuggling pilot and that Geittmann, himself a successful smuggler, needed such a pilot—brought the two individuals together. When Callihan and Geittmann met in Aspen, moreover, they discussed three future ventures about which Callihan later informed petitioner. As the court of appeals correctly concluded, "[t]his evidence indicates a continuing course of unlawful conduct and not a lone, isolated attempt or casual involvement" (Pet. App. 14a).

Petitioner asserts (Pet. 23), however, that the decision below rested solely upon Callihan's and Geittmann's past activities and that the record does not indicate that petitioner was even aware of those activities. These assertions are inaccurate. The court of appeals expressly relied (Pet. App. 14a) on Callihan's and Geitmann's discussions of future smuggling activity, and the evidence is clear that petitioner not only learned of those plans, but knew of Callihan's and Geittmann's past activities as well.[3]

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[3]Petitioner also asserts, without supporting authority, that the government, at a minimum, "must prove beyond a reasonable doubt that [he] at least had knowledge of the business enterprise" (Pet. 23). Even were this assertion true, the evidence here demonstrates that petitioner had such knowledge.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

MAURY S. EPNER
Attorney

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